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ATTORNEYS FOR APPELLEE:

TRACY S. PREWITT

AMY M. STEWART

**IN THE
COURT OF APPEALS OF INDIANA**

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JUNE 9, 2008

HOFFMAN, Senior Judge

Plaintiffs-Appellants Grace Gilley (deceased) by Belva Johnson, as personal representative of the estate of Grace Gilley and others appeal the trial court's grant of summary judgment in favor of Defendant-Appellee Roberta Coleman, M.D. We affirm.

Plaintiffs-Appellants raise one issue for our review, which we restate as: Whether the trial court erred in granting summary judgment for Dr. Coleman.¹

On January 29, 2001, 71-year-old Gilley drove her vehicle left of the center line on Highway 111 in Harrison County, Indiana. She struck a vehicle in which Plaintiffs-Appellants Belva Johnson, Alesa Crawford, and Robin Powers were riding. Gilley died from the injuries suffered in the collision, and Johnson, Crawford, and Powers sustained serious injuries.

Johnson, Crawford, and Powers (hereinafter, "the plaintiffs") first sued, then settled with Gilley's estate. The settlement provided for payment to the plaintiffs. The settlement also provided that Johnson would become administratrix of Gilley's Estate and that the Estate would assign its rights to file any claims of medical negligence to the plaintiffs.

The plaintiffs subsequently filed a proposed complaint against Dr. Coleman, alleging, *inter alia*, that (1) Gilley had been a patient of Dr. Coleman for the last several months and years of Gilley's life; (2) Dr. Coleman treated Gilley, over a number of years, for functional limitations of her wrist, hand, and knees, history of falling and failing coordination, somnolence issues (with accompanying narcotic prescription and use), functional limitation of the right shoulder with impingement syndrome and pain, and ischemic heart disease; (3) Dr. Coleman should have restricted Gilley from driving but did not do so; (4) Gilley suffered a heart attack immediately before the accident which resulted in her death and injuries to the plaintiffs, and (5) Dr. Coleman's negligence caused Gilley's death and the injuries to the plaintiffs. (Appellants' App.

¹ The various parties will be introduced in our discussion below.

at 7-9). The medical review panel rendered a unanimous expert opinion that the evidence did not support the conclusion that Dr. Coleman failed to meet the applicable standard of care as charged in the proposed complaint.

The plaintiffs then filed a complaint with the trial court, in which they claimed that (1) Dr. Coleman should have restricted Gilley's driving privileges for various reasons, including the fact that she had had "chest pains," and (2) the accident causing Gilley's death and the plaintiffs' injuries occurred after Gilley "suffered a heart attack immediately before and while driving her vehicle left of center on [the date of the accident]." (Appellant's App. at 52). Dr. Coleman responded by filing a motion for summary judgment, in which she claimed that there was no expert opinion to support the plaintiffs' position. The plaintiffs' filed an affidavit in which Dr. David Hunt averred that Dr. Coleman should have restricted Gilley's driving privileges. Dr. Coleman withdrew her motion.

Subsequently, Dr. Coleman filed a second motion for summary judgment in which she claimed that there was no question of fact bearing on the plaintiffs' claim that Gilley suffered a heart attack right before the accident, i.e., that her alleged malpractice was the proximate cause of the accident. The plaintiffs' responded that proof of the heart attack was not necessary to their claim of medical malpractice for failure to restrict Gilley's driving privileges. After a hearing on the motion for summary judgment, the trial court granted Dr. Coleman's motion. The plaintiffs now appeal.

The purpose of summary judgment is to terminate litigation about which there is no factual dispute and which may be determined as a matter of law. *Ratcliff v. Barnes*, 750 N.E.2d 433, 436 (Ind. Ct. App. 2001), *trans. denied*. When reviewing the grant or denial of summary judgment this court applies the same standard as the trial court. *Id.* Summary judgment is

appropriate only if the designated evidentiary material shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In a medical malpractice action based upon alleged negligence, plaintiffs must establish:

- (1) a duty on the part of the defendant in relation to the plaintiffs;
- (2) a failure on part of the defendant to conform her conduct to the requisite standard of care required by the relationship; and
- (3) an injury to the plaintiffs resulting from the defendant's failure (proximate causation).

Sawlani v. Mills, 830 N.E.2d 932, 938 (Ind. Ct. App. 2005), *trans. denied*.

With a few specific exceptions, expert testimony is required to prove both the standard of care and causation in order to establish that a genuine issue of material fact exists. When a medical review panel has already rendered an opinion in favor of the defendant doctor, the plaintiffs must come forward with expert medical testimony to rebut the panel's opinion in order to avoid summary judgment. *Brown v. Banta*, 682 N.E.2d 582, 584 (Ind. Ct. App. 1997), *trans. denied*; *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992). This tenet was stated in *Malooley v. McIntyre*, 597 N.E.2d 314 (Ind. Ct. App. 1992), wherein the defendant doctors had filed a motion for summary judgment because the plaintiff failed to disclose a causation expert, despite the fact that a medical review board panel had previously found in favor of the doctors. The court held:

Although the burden of going forward with evidentiary matter was shifted, the Estate was under no obligation to present evidence sufficient to prevail upon its claims in the context of a full-blown trial. It was, however, obliged to establish a sufficient basis upon which the court might find the existence of a genuine triable issue with respect to the question of probable cause. Appellants contend that the Estate did not meet this burden because it offered no expert opinion evidence to refute the conclusion stated in the Panel's

Opinion. The Estate in fact offered only a brief containing legal arguments. The only evidence before the trial court which supported the Estate's position upon the issue of proximate cause, the, were the facts alleged (and for purposes of summary judgment, taken as true) in the Estate's Complaint for Damages.

When, as here, a medical malpractice civil suit is filed after a medical review panel has issued an opinion, which finds against the complainant upon the issue of causation, and no member of the panel opines that causation does exist, the complainant proceeds in considerable peril if he rests upon the factual allegations contained in the complaint. The complainant must do more than rest upon his complaint.

The record before us contains competent admissible expert opinion that there was no causation. The record is entirely devoid of evidence from which the trial court could reasonably infer a causal link between the appellant's actions and McIntyre's death. Absent such evidence, the trial court erred in denying the [defendant doctors'] motions for summary judgment.

Id. at 317 (citations omitted). We later held that doctors and hospitals are entitled to summary judgment as a matter of law when plaintiffs fail "to come forward with expert medical testimony to refute the panel's opinion on the issue of proximate cause." *Chambers by Hamm v. Ludlow*, 598 N.E.2d 1111, 1116 (Ind. Ct. App. 1992).

In the present case, the medical review panel unanimously ruled in favor of Dr. Coleman, and none of the panelists gave any causation opinions against her. Indeed, one of the panelists, Dr. Terry Perkins, pointed out that the last time that Dr. Coleman saw Gilley was to treat a minor toe infection that required an antibiotic. He, as well as fellow panel member, Dr. Kevin Rogers opined that Gilley did not suffer a heart attack on or prior to the accident. Dr. Perkins also averred that the stroke suffered by Gilley occurred in 1992, and Dr. Rogers and Dr. Coleman averred in their depositions that the stroke had no effect on Gilley's driving ability in 2001. Dr. Perkins and Dr. Coleman averred that the chest pain experienced by Gilley was not cardiac but

was gastrointestinal. Accordingly, she was prescribed Protonix, a medicine to treat gastrointestinal and esophageal conditions such as acid reflux.

The burden shifted to the plaintiffs to demonstrate the existence of a genuine issue of fact regarding causation. The plaintiffs did not come forward with any expert opinion on causation. Indeed, the plaintiffs' expert, Dr. David Hunt, admitted that he could not tie the accident to a heart attack either prior to or during the accident.

The plaintiffs alleged below and argue on appeal that no expert testimony about causation was required. Our courts have held that expert testimony is not required when the fact finder does not need technical input to understand that the physician's conduct fell below the applicable standard of care. *Whyde v. Czarkowski*, 659 N.E.2d 625, 628 (Ind. Ct. App. 1995), *trans. denied*. This exception is narrow and is restricted to cases in which the alleged malpractice is "so obvious as to allow plaintiffs to rely on the doctrine of res ipsa loquitur." *Id.* (quoting *Wright v. Carter*, 622 N.E.2d 170, 171 (Ind. 1993)). The exception has generally been applied in cases where a physician has left a foreign object, such as cement, a sponge, or surgical padding, in the patient's body after surgery. *Bowman v. Beghin*, 713 N.E.2d 913, 916-17 (Ind. Ct. App. 1999).

Here, there is no evidence that would enable a fact finder to make a decision without input from an expert. Accordingly, the narrow exception to the general rule requiring expert testimony does not apply, and the plaintiffs have failed to meet their burden.

Affirmed.

DARDEN, J., and FRIEDLANDER, J., concur.